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William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Written Ex Parte Communication
Docket 09-182

Dear Mr. Lake:

During the February 12, 2013 meeting with you and your staff, which I attended as an advisor to Free Press, I made reference to the brief filed by the public interest Petitioners in *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011). For your convenience, pages 40-43 and Appendix B to the brief accompany this letter.

For many years, public interest groups have repeatedly complained that the Commission fails to give adequate notice when licensees request waivers of the broadcast ownership rules. As the brief explains, neither the notice applicants are required to broadcast nor the Commission's *Public Notice* of such applications disclose that a waiver has been requested. Moreover, the Commission's notices are not generally available to residents of a licensee's service area, and are in any event indecipherable to a layperson.

This is a matter which should have been remedied many years ago. The Commission can and should do so now.

Respectfully submitted,



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cc. Sarah Whitesell
Brendan Holland
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example, the term “local news” is not defined. And, although the order states that the Commission will monitor combinations to see if they live up to their commitments, *id.*, JA265, it is unclear how the Commission can do this since licensees are not required to report the amount of news programming to either the FCC or the public.¹⁵ In his dissent, Commissioner Adelstein noted that he had “real doubts about the Commission’s willingness to enforce the seven-hour weekly news requirement.” *2008 Order* at 2124-25 (Adelstein, dissenting), JA340-341.

C. The Revised NBCO Rule Places an Undue Burden on the Public to Rebut the Waiver Presumption

The new waiver tests, as Commissioner Copps noted, have “all the firmness of a bowl of Jell-O.” *2008 Order* at 2117 (Copps, dissenting), JA333. In addition, the entire waiver scheme is fundamentally flawed because without a reasonable opportunity for public participation, the FCC will be making decisions based solely on the self-serving representations of the applicants.

In an analogous case in the D.C. Circuit, the Court found that it was arbitrary and capricious for the FCC to rely on public participation while simultaneously depriving members of the public of information they need to exercise their right under Section 309 of the Communication Act to object to the renewal of a

¹⁵In fact, since the Commission does not know what stations are presently programming, it cannot even verify representations as to the baseline from which to apply the seven-hour test.

broadcast license on the ground that it would not serve the public interest. *UCC v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). The Court stated:

This proposed renewal scheme would place near-total reliance on petitions to deny as the means to identify licensees that are not fulfilling their public interest obligations. That the Commission would simultaneously seek to deprive interested parties and itself of the vital information needed to establish a prima facie case in such petitions seems almost beyond belief.

Id. at 1441-42. The Court further held that “if the Commission should alter a policy and yet fail to recognize the change or fail to provide either adequate explanation or adequate consideration of relevant factors and alternatives, we must set aside the Commission’s action and remand for further proceedings.” *Id.* at 1426.

Members of the public also have a right under the Communications Act to challenge broadcast licenses transfers that would not be in the public interest. 47 U.S.C. §§ 309, 310. Further, in the *2008 Order*, the FCC adopted a scheme that relies on public participation to rebut a presumption that an application meeting the presumptive waiver criteria or local news test is nonetheless not in the public interest, or to rebut the claims of applicants that they should get a waiver under the four factor test.

Citizen Petitioners expressed concern about lack of public notice of newspaper-broadcast waiver applications. *UCC/MA on Martin Proposal* at 13,

JA4724; Free Press on Martin Proposal at 42, JA4735. In the Commission's one paragraph response, it noted that applicants were already subject to the public notice requirement in §73.3580 of its rules, 47 C.F.R. § 73.3580, and that the Commission planned to "flag" such applications in its own public notice. *2008 Order* at 2057, JA273.

This curt rejection shows that the Commission failed to consider an important aspect of the problem. As UCC/MA pointed out, "To constitute sufficient public notice, the notice must at a minimum clearly state that the applicants are seeking a waiver of the cross-ownership rule and that the public has a right to object by a certain date. In addition, such notice must be provided in a manner calculated to actually reach the public." UCC/MA on Martin Proposal at 13, JA4724. But as the Commission is well aware, § 73.3580, which spells out the wording that applicants must use in on-air announcements alerting members of their service areas that the station has filed an application with the FCC and that the public has the right to object, does not say anything about whether the applicant is seeking a waiver of FCC rules. *See* 47 CFR § 73.3580(d)(4)(text of announcement); *id.* at § 73.3580(f)(similar).

Nor do the public notices issued by the Commission contain this information. For the convenience of the Court, Citizen Petitioners have appended an example of an FCC public notice as App. B. This example is one page of a 31

page public notice. It lists Media General's application for renewal of its Columbus, GA station. Although Media General's application included a request for a permanent waiver of the NBCO rule, that is not noted anywhere in the FCC's public notice.

Even if the Commission "flags" applications with waiver requests, it would not give meaningful notice to the viewers and listeners served by the station.¹⁶ Unlike the several hundred broadcast lawyers who routinely review the FCC's daily public notices, the remaining 300 million Americans cannot reasonably be expected to review these lengthy public notices every day in case a station in their community might be seeking a waiver.

Thus, the FCC failed to meet the standard set out in *Prometheus* and *Motor Vehicle Mgrs Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), to consider all relevant factors or alternatives. Moreover, it has acted unreasonably in placing the burden on the public to rebut the presumptive showings without giving adequate notice of waiver requests for the public to participate.

II. THE FCC ACTED ARBITRARILY, CAPRICIOUSLY, AND IN VIOLATION OF LAW WHEN IT GRANTED PERMANENT

¹⁶Each day, the FCC issues a public notice typically listing well over 100 newly filed applications, many of them for trivial engineering changes. While these listings are of interest of communications lawyers and broadcast engineers, they are indecipherable to almost everyone else.

PUBLIC NOTICE

Federal Communications Commission
445 Twelfth Street SW
Washington, D.C. 20554

News media information 202 / 418-0500 Recorded listing of releases and texts 202 / 418-2222

REPORT NO. 25879

Broadcast Applications

12/10/2004

<u>STATE FILE NUMBER</u>	<u>E/P CALL LETTERS</u>	<u>APPLICANT AND LOCATION</u>	<u>NATURE OF APPLICATION</u>
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TELEVISION APPLICATIONS FOR RENEWAL ACCEPTED FOR FILING

AL BRCT-20041201BIL	E	WKRG-TV 73187 MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. AL, MOBILE	Renewal of License
GA BRCT-20041201BJY	E	WJBF 27140 MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. GA, AUGUSTA	Renewal of License
AL BRCT-20041201BLS	E	WPMI-TV 11906 CLEAR CHANNEL BROADCASTING LICENSES, INC. AL, MOBILE	Renewal of License
GA BRCT-20041201BMX	E	WNEG-TV 63329 MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. GA, TOCCOA	Renewal of License
GA BRCT-20041201BZP	E	WRBL 3359 MEDIA GENERAL BROADCASTING OF SOUTH CAROLINA HOLDINGS, INC. GA, COLUMBUS	Renewal of License